Supreme Court, U. S.
FILED
JUN 28 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1799

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Petitioner

v.

FEDERAL POWER COMMISSION

BRIEF OF ELIZABETHTOWN GAS COMPANY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN T. MILLER, JR.
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorney for
Elizabethtown Gas Company

June 1977

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
STATEMENT	2
REASONS FOR GRANTING THE WRIT OF CERTIORARI	4
CONCLUSION	10
APPENDIX AA	1a
APPENDIX BB	5a

INDEX OF CITATIONS

COURT DECISIONS:

Consolidated Edison Co. of New York v. FPC, 512 F.2d 1332 (D.C. Cir. 1975)	7, 8
Consolidated Edison Co. of New York v. FPC, 511 F.2d 372 (D.C. Cir. 1974)	3
Consolidated Gas Supply Corp. v. FPC, D.C. Cir. No. 75-1324	6
Elizabethtown Gas Co. v. FPC, D.C. Cir. No. 76-1465	6
Elizabethtown Gas Co. v. FPC, D.C. Cir. No. 75-1767	6
FPC v. Louisiana Power & Light Co., 406 U.S. 621 (1972)	7
FPC v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326 (1976)	3
Granite City Steel Co. v. FPC, 320 F.2d 711 (D.C. Cir. 1963)	8
Mississippi Public Service Commission v. FPC, 522 F.2d 1345 (5th Cir. 1975), cert. denied 97 S.Ct. 181 (1976)	5, 6, 7
Monsanto Co. v. FPC, 463 F.2d 799 (D.C. Cir. 1972)	9
Panhandle Eastern Pipe Line Co. v. FPC, 204 F.2d 675 (3d Cir. 1953)	8
Public Service Comm. of New York v. FPC, 463 F.2d 824 (D.C. Cir. 1972)	8
State of Louisiana v. FPC, 503 F.2d 844 (5th Cir. 1974)	9

Page

State of North Carolina *et al* v. FPC, D.C. Cir. Nos. 76-2102, *et al* 4

Transcontinental Gas Pipe Line Corp. v. FPC, D.C. Cir. Nos. 74-2036, *et al*, November 29, 1976 ..... 3, 4

AGENCY DECISIONS:

Transcontinental Gas Pipe Line Corp., FPC Opinion 778-A, issued December 8, 1976 4

Transcontinental Gas Pipe Line Corp., FPC Opinion 778, issued October 8, 1976 4

Transcontinental Gas Pipe Line Corp., Docket RP72-99, order of November 12, 1974 .....2, 3, 4, 5

Transcontinental Gas Pipe Line Corp., 48 F.P.C. 1060 (1972) 2

Transcontinental Gas Pipe Line Corp., 46 F.P.C. 1212 (1971) 2

United Gas Pipe Line Co., 49 F.P.C. 1211 (1973) 9

STATUTES:

Natural Gas Act, 15 U.S.C. 717 *et seq.*

Section 4(b) 7

Section 7(a) 8

Section 7(g) 8

Section 19(b) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1799

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Petitioner

v.

FEDERAL POWER COMMISSION

BRIEF OF ELIZABETHTOWN GAS COMPANY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Elizabethtown Gas Company (Elizabethtown), one of the petitioners in the Court below, and therefore, a party herein (Rule 21(4)), urges this court to grant the petition for writ of certiorari summarily and effect an immediate remand to enable the Court of Appeals to reverse expeditiously a Federal Power Commission (FPC) holding that compensation provisions in gas pipeline curtailment plans are *per se* unlawful.

STATEMENT

Transcontinental Gas Pipe Line Corporation (Transco) owns and operates an interstate natural gas pipe-

line system extending from Texas to New York City from which it serves one firm direct industrial customer and 80 firm wholesale (sale for resale) customers which in turn supply residential, commercial and industrial consumers. The Federal Power Commission regulates the transportation and sale of gas by Transco. Local authorities regulate the operations of Transco's wholesale customers.

Elizabethtown is a public utility distributing natural gas in 68 communities serving over 183,000 consumers under regulation by the New Jersey Board of Public Utility Commissioners. Elizabethtown has been in the gas distribution business for 125 years. Prior to the initiation of natural gas service by Transco in 1951, Elizabethtown manufactured the gas that it sold to consumers. Transco is Elizabethtown's principal natural gas supplier today.

Due to insufficient gas supplies, Transco has been curtailing firm gas service on its system for over three years. The shortages are continuous, year round and worsening.[1] Until November 1, 1976, curtailments were governed by interim curtailment plans filed by Transco with the FPC.

From November 1971 through October 1974, curtailment plans in effect on the system of Transco contained compensation provisions to offset disproportionate curtailments afforded wholesale customers asking for such treatment.[2] By order issued November 12, 1974 the

[1] Transco curtailed 7.41% in 1972-73. Transco has announced that it expects to curtail 49.3% during the 1977-78 winter.

[2] See *Transcontinental Gas Pipe Line Corporation*, 46 F.P.C. 1212, 1213 (1971); 48 F.P.C. 1060, 1061 (1972).

FPC denied a motion to approve an interim settlement agreement (ISA), intended to effect an interim plan for the period November 16, 1974 through November 15, 1975. The plan contained a compensation provision which the Commission, through a reversal of its prior position, found to be illegal *per se*. The appeals in the court below are from the November 12, 1974 order. *Transcontinental Gas Pipe Line Corp.* v. *FPC*, D.C. Cir. Nos. 74-2036, *et al.*

The court of appeals overruled the FPC, ordered the ISA into effect and directed that the compensation payments be deposited by Transco in escrow.[3] Transco's wholesale customers receiving a disproportionate share of the available gas paid $18.9 million in compensation into escrow during the year the ISA was in effect.

Due to two digressions, the court below has not yet reached the issue whether the FPC was in error in holding on November 12, 1974 that a compensation provision in a curtailment plan is *per se* unlawful. First, the court ordered the FPC to conduct an inquiry into Transco's gas supply situation and report the results to the court within a specified time. This order was overruled in *FPC* v. *Transcontinental Gas Pipe Line Corporation*, 423 U.S. 326 (1976). Second, the lower court indicated by its November 29, 1976 order that it will not consider the appeals further until the FPC presents to the court the results of further gas supply studies. No time limit was imposed. This second order is now before this court.[4]

[3] See *Consolidated Edison Company of New York, Inc.* v. *FPC*, 511 F.2d 372 (D.C. Cir. 1974).

[4] See Petition for Writ of Certiorari, Appendix A.

Meantime, the fact that the court below had failed to resolve the issue of the asserted *per se* illegality of compensation was used by the FPC as a reason for refusing to include a compensation provision in the permanent curtailment plan established for the Transco system by Opinion 778 issued October 8, 1976 in *Transcontinental Gas Pipe Line Corporation*, Docket RP72-99.[5] Compensation was left as the subject of a deferred hearing, no date for which has yet been set. By Opinion 778-A, issued December 8, 1976, the Commission rejected applications for rehearing on the compensation issue, justifying its action in large measure by reference to the court's November 29, 1976 order.[6]

REASONS FOR GRANTING THE WRIT

1. The lower court's order of November 29, 1976 deprives parties of speedy court review of a question of law already decided by another Court of Appeals.[7] The court below has placed itself in a position where it will not come to grips with the basic issue whether the

[5] This is the same curtailment proceeding in which the FPC order of November 12, 1974, striking down the ISA, was issued. The Opinion 778 curtailment plan was made effective November 1, 1976.

[6] For the information of the court, relevant pages of Opinion 778-A are set out in Appendix AA to this brief. Elizabethtown's challenge of Opinions 778 and 778-A has been consolidated with other appeals in a proceeding entitled, *State of North Carolina et al.* v. *FPC.*, D.C. Cir. Nos. 76-2102, *et al.* Briefs have been filed therein and the matters await oral argument.

[7] See Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b). Relevant statutory provisions may be found in Appendix BB to this brief.

Commission was in error in holding that it is *per se* unlawful to include a compensation provision in a curtailment plan. This not only blocks any disposition of the funds held in escrow but, more importantly, the court's order is used to stonewall inclusion of a compensation provision in the pipeline company's permanent curtailment plan.

A. The Fifth Circuit has already rejected the Commission's *per se* illegality holding on review of an FPC order which relied on the logic of its November 12, 1974 action in the *Transco* case.[8] *Mississippi Public Service Commission* v. *FPC*, 522 F.2d 1345 (5th Cir. 1975). The Court held:

> "It seems to us, however, that compensation payments are not 'rates' but in the nature of surcharges imposed in the context of a curtailment plan to insure that the burdens of curtailment are spread evenly and equitably among those affected by such plans. . ." (522 F.2d at 1350)
>
> "In sum, we conclude that the imposition of compensation payments as a condition for the receipt of higher priority gas is within the statutory power of the FPC over the movement of such gas in interstate commerce." (*Idem.*)

[8] "The Commission noted that it had taken similar action in another but unrelated proceeding, and incorporated the reasoning in the orders in the other proceeding by reference.[8]

[8] *Transcontinental Gas Pipe Line Co.*, FPC Docket No. RP72-99, Order Finding An Emergency On Transco's System and Denying Motion for Interim Settlement As to Curtailment Rules, November 12, 1974, and Order Granting Rehearing in Part, Denying Rehearing In Part, and Requiring Environmental Impact Statement, January 10, 1975, *pending review sub nom. Transcontinental Gas Pipe Line Corp., et al.* v. *F.P.C.*, D.C. Cir., Nos. 74-2036, et al. (argued May 21, 1974). . . ."

522 F.2d at 1348.

The FPC sought review by this Court, citing the pendency in the court below of the compensation issue in the *Transco* case and three others.[9] Nonetheless, the petition for writ of certiorari was denied. *FPC* v. *Mississippi Public Service Commission,* —— U.S. ——, 97 S. Ct. 181 (1976).

B. The court, without a decision on the merits, has placed the FPC in a position where it can frustrate indefinitely the efforts of those seeking to remedy an inequitable and unduly preferential curtailment plan for the Transco system through a compensation provision.

Gambling on a possible conflict of circuits, the Commission has refused to apply the holding in *Mississippi Public Service Commission* to the Transco pipeline system in subsequently establishing a permanent curtailment plan.

> "The Supreme Court denial of our petition for certiorari of the *Mississippi Public Service Commission* decision, *supra* note 10, increases the need for the court in No. 74-2036 to issue its decision, but it does not warrant our prejudicing No. 74-2036. . . ." (Appendix AA, p. 4a)

A vacuum has been created. As the FPC controls the allocation of its personnel and the priority of work

[9] See Petition for Writ in *FPC* v. *Mississippi Public Service Commission,* No. 75-1678, p. 10, n. 4. Of the other three cases there cited by FPC, *Consolidated Gas Supply Corp.* v. *FPC,* D.C. Cir. No. 75-1324 was dismissed on June 24, 1977 on joint motion of both parties; *Elizabethtown Gas Co.* v. *FPC,* D.C. Cir. No. 75-1767 was dismissed on June 13, 1977 as moot; and *Elizabethtown Gas Co.* v. *FPC,* D.C. Cir. No. 76-1465 was the subject of oral argument on June 17, 1977.

assignments, the Commission can postpone indefinitely the gas supply studies contemplated by the November 29, 1976 court order and, thereby, a resolution of the compensation issue. This places those who are challenging the Commission's basic legal premise in the position where they are effectively denied relief from an erroneous Commission decision. The "effects of curtailment, even over the short term, can be irrevocable." *Consolidated Edison Company of New York, Inc.* v. *FPC,* 512 F.2d 1332, 1343 (D.C. Cir. 1975).

2. It is not the depth of the pipeline gas shortage but the disproportionate sharing of the available gas supplies in time of shortage that gives rise to the need for compensation payments under the antipreference provisions of Section 4(b) of the Natural Gas Act.[10] The Fifth Circuit recognized this important difference in *Mississippi Public Service Commission* when it referred to the need to spread the burdens "evenly and equitably among those affected by such plans";[11] the court below did not when it called for further gas supply studies.

A. Certain of Transco's customers are receiving more than a proportionate share of the available low cost pipeline gas. While the preference is expressed in terms of assuring continued safe service to high priority consumers who cannot readily convert to other fuels, in fact one of the ultimate causes is the failure of the local distribution company to take the steps necessary to assure that sufficient supplemental gas sup-

[10] 15 U.S.C. 717c(b). Section 4(b) is the standard by which curtailment plans are to be judged. *FPC* v. *Louisiana Power & Light Co.,* 406 U.S. 621, 642 (1972).

[11] 522 F.2d at 1350.

plies will be on hand for the purpose. The pipeline can deliver the larger volumes to such wholesale customers only if other wholesale customers are in a position to get along with less gas either because they have made provisions for supplemental supplies or they are prepared to forego for a time certain of their sales.

If the favored wholesale customer could "payback" the excess volumes by taking less gas from the pipeline supplier at another time of the year, the prejudice to other customers might not be undue. But pipeline curtailments are now so deep that that form of offset to an undue preference is no longer practical.[12]

It is well to remember that the interstate pipeline companies regulated by the FPC are not public utilities. They enjoy no monopoly in providing gas service in any part of the country.[13] Nor do they have the concomitant obligation to serve. As their natural gas supplies dry up, they withdraw from the scene. The FPC's responsibilities fade away simultaneously, as it cannot commandeer a gas supply for an interstate pipeline or oblige it to continue service when its committed reserves are gone.[14]

The wholesale customers of the pipelines cannot shed their public utility service obligations that easily. It may make sense, for a time, for such wholesale customers to give up a part of their pipeline supply to another public utility in difficulties. But there must be redress for the consequential economic injury and a built-in incentive for the advantaged public utility to assume its proper burden of meeting local market requirements from supplemental gas supplies of its own devising. Compensation provisions, properly designed, serve both purposes.

B. Compensation payments do not originate with the pipeline company. Through billing adjustments, the pipeline company serves only as a conduit facilitating payments by advantaged customers to disadvantaged customers so that shortages may be shared equally.

Compensation payments are not surrogates for the payment of damages by the pipeline company where the supply shortage is caused by its negligence, bad faith, improvidence, or breach of contract. See *Monsanto Co.* v. *FPC,* 463 F.2d 799, 808 (D.C. Cir. 1972).

A curtailment case before the FPC is concerned with who gets the available gas; not with the liability of the pipeline for having caused the shortage.[15] Therefore, the detailed examination of Transco's gas supplies called for by the order of the court below is not warranted.

---

[12] *Consolidated Edison Co. of New York* v. *FPC,* 512 F.2d 1332, 1343 (D.C. Cir. 1975).

[13] See Sections 7(a) and 7(g) of the Natural Gas Act, 15 U.S.C. 717f(a) and 717f(g); *Granite City Steel Co.* v. *FPC,* 320 F.2d 711 (D.C. Cir. 1963).

[14] See *Public Service Commission of New York* v. *FPC,* 463 F.2d 824, 830 (D.C. Cir. 1972); *Panhandle Eastern Pipe Line Co.* v. *FPC,* 204 F.2d 675, 679 (3d Cir. 1953).

[15] The discussion by the court below with reference to the need to curtail (Slip Op. pp. 10-11), refers to the Commission's decision in *United Gas Pipeline Co.,* 49 F.P.C. 1211, 1220 (1973) which was vacated in *State of Louisiana* v. *FPC,* 503 F.2d 844, 864 (5th Cir. 1974). There the court stated: "FPC should bear in mind that the question here is not whether United should 'bear responsibility for the shortage on its system'; rather it is who should get the gas that is now available."

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

JOHN T. MILLER, JR.
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorney for
Elizabethtown Gas Company

June 1977

APPENDIX

APPENDIX AA

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Opinion No. 778-A

Docket No. RP72-99

Transcontinental Gas Pipe Line Corporation

Opinion and Order Granting in Part and Denying in Part Petitions for Rehearing

Issued: December 8, 1976

• • •

VII. Compensation

Elizabethtown, South Jersey, North Carolina, Con Ed and Piedmont apply for rehearing of the deferral of the compensation question pending judicial resolution of the third interim settlement agreement compensation provision in *Transcontinental Gas Pipe Line Corporation* v. *FPC*, No. 74-2036 (D.C. Cir.). Together or separately they make the following arguments in favor of presently implementing a compensation provision:

> 1.) There is record evidence supporting imposition of compensation payments (to cover revenue losses or cost of supplemental supplies) so as to mitigate the disproportionate impact of curtailment. 2.) Commission authority to order compensation has been judicially determined, so as to preclude further Commission deferral of the issue.[10] 3.) It is error to defer this

[10] *Mississippi Public Service Commission* v. *F.P.C.*, 522 F.2d 1345 (5th Cir. 1975), *reh. denied en banc* 526 F.2d 816 (1976), *cert. denied*, 45 U.S.L.W. 3254 (October 4, 1976); and *Fort Pierce Utility Authority* v. *FPC*, 526 F.2d 993 (5th Cir. 1976).

issue pending a court decision in No. 74-2036 because that appeal relates to a different compensation arrangement. 4.) The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit over the appeal in No. 74-2036 is questionable because its February 6, 1976, remand to the Commission could divest its jurisdiction under its own Rule 13(d), as the Commission allegedly recognized. 5.) No permanent curtailment plan can be established absent final disposition of the compensation question.

Brooklyn and PSE&G, on the other hand, seek rehearing of the deferral of the compensation question, arguing that the Commission should have definitively rejected the compensation proposals.

We deny the several applications for rehearing of the deferral of the compensation question. Subsequent to our decision in Opinion No. 778 to defer further consideration of the compensation question until the then hoped for imminent D.C. Circuit decision resolving the compensation issue in No. 74-2036, that court handed down an opinion [11] which not only fails to resolve the controversy but also forbodes a substantial period before a final judicial statement will be forthcoming. A divided three judge panel has found our June 25, 1976, order in response to its February 6, 1976, remand of the record in No. 74-2036 to be inadequate for its purposes, which are to determine whether there is in fact a gas shortage on the Transco system before it decides the compensation appeal before it. The court was specifically disenchanted with the Commission's June 25, 1976, forwarding of exclusively deliverability evidence. In order to obtain substantial information regarding "the duration, shape and causation of the alleged shortage on the Transco system," the court has remanded the record

[11] *Transcontinental Gas Pipe Line Corporation, et al.* v. *FPC*, No. 74-2036 (D.C. Cir. November 29, 1976).

for supplementation as to whether there "[a]re sufficient volumes of gas available as proved or provable reserves so that greater total deliverability can be foreseen in the short-term future?"

As Judge MacKinnan astutely perceived in his dissenting opinion, this remand will require "an extensive and complex investigation, study and report." Accordingly, final resolution of the compensation issue in No. 74-2036 can no longer be seen as imminent. Such delay is all the more distressing in that, as Judge MacKinnon also notes, the appeal presently before the court is to the Commission's November 12, 1974, and January 10, 1975, orders rejecting any compensation plan as illegal *per se*, which could be decided without need for this remand of the record.

The present condition of uncertainty on the compensation question engendered by this remand of the record, *supra* note 11, is heightened by the 5th Circuit's ruling on compensation in *Mississippi Public Service Commission* v. *FPC*, *supra* note 10; however, Opinion No. 778 does not do violence to that legal precedent because we found therein (slip op. at 69) that the "instant record is insufficient to permit adequate deliberation." [12] This prior finding of insufficient record evidence is moreover compelled by the D.C. Circuit's most recent remand, *supra* note 11, for the present record clearly does not include evidence concerning Transco's "provable" reserves, that which the D.C. Circuit finds essential to determining "the legality of the compensation scheme at issue here." Accordingly, without abandoning our legal position in No. 74-2036, we reject the compensation arrangements proposed during the permanent curtailment plan proceeding and pursued on

[12] It must be remembered that the permanent plan record was closed before the Commission ruled in November 1974, that compensation is illegal *per se*. Accordingly, the parties were permitted to introduce evidence on compensation, but that evidence is insufficient to warrant imposition of a compensation plan.

brief. Of course the proponents of compensation are always entitled under Section 5 of the Natural Gas Act to initiate a complaint proceeding against the absence of a compensation provision in Transco's permanent curtailment plan, of course bearing the burden of proof.

In support of this course of action we reject the several arguments raised on rehearing. The Supreme Court denial of our petition for certiorari of the *Mississippi Public Service Commission* decision, *supra* note 10, increases the need for the court in No. 74-2036 to issue its decision, but it does not warrant our prejudicing No. 74-2036. Moreover, while the appeal in No. 74-2036 is to the Commission's summary rejection of the compensation provision of the third interim settlement agreement, certain controlling legal precedents incumbent in any court decision in No. 74-2036 could impact upon the compensation proposals presently before the Commission. In addition, the Court of Appeals does retain jurisdiction over No. 74-2036, notwithstanding the "remand" language in the court's February 6, 1976, order, as it so stated in its recent remand order, *supra* note 11, slip op. at 7, n. 1. Furthermore, while compensation might raise serious questions of equity, it is not a necessary predicate to the establishment and implementation of Transco's permanent curtailment plan. Finally, we had examined the record evidence cited on rehearing favoring compensation before issuing Opinion No. 778. While this is some evidence, it is inadequate on its own for establishing a compensation provision. Questions of basic legal and equitable right to, the duration of, the mechanism for, and the quantum of compensation all require further evidence.

• • •

APPENDIX BB

Extracts From The Natural Gas Act

(15 U.S.C. 717, et seq.)

Sec. 4.(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service. 15 U.S.C. 717c(b))

• • •

Sec. 7.(a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers. (15 U.S.C. 717f (a))

• • •

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company. (15 U.S.C. 717f (g))

• • •

Sec. 19 (b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material

and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, sec. 1254). (15 U.S.C. 717r (a) and (b))

• • •